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Nos. 85-1658 and 85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,

Appellees.

GROUP W CABLE, INC., *et al.*,

Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,

Appellees.

On Appeal From The United States Court Of Appeals For The Eleventh Circuit

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

Whether a Federal Communications Commission Order issued pursuant to the Pole Attachments Act, 47 U.S.C. § 224, authorizing cable television companies to occupy space on Florida Power Corporation's poles at a rate less than one-third the rate specified in existing contracts between the parties effected a taking of Florida Power's property.

Whether the Pole Attachments Act is unconstitutional insofar as it authorizes takings of property and fails to provide for the determination of just compensation required by the fifth amendment to the Constitution.

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MOTION TO AFFIRM

Pursuant to S. Ct. Rule 16.1, appellee Florida Power Corporation moves that this Court affirm the decision of the United States Court of Appeals for the Eleventh Circuit. The grounds for this motion are that the decision of

the Eleventh Circuit is correct and that the case warrants no further review by this Court.

STATEMENT

Most cable television companies have formed their distribution systems, since the advent of cable television in the 1950's, by attaching equipment to preexisting pole systems owned by telephone companies or electric power companies.[1] The cable operator usually attaches its equipment pursuant to contracts with the pole owners specifying an annual space rental rate.[2] Teleprompter Corporation and Teleprompter Southeast, Inc. ("Teleprompter"), Acton CATV, Inc., d/b/a Brookville Properties Venture and PASCO Associates Venture ("Acton") and Cox Cablevision Corp., d/b/a Highlands Cable TV ("Cox") entered into such contracts with Florida Power Corporation ("Florida Power")[3] during the 1960's and 1970's.

For many years, the cable operators sought federal intervention in the private pole attachment rate-setting process. In 1978, Congress passed the Pole Attachments Act, 47 U.S.C. § 224 (the "Act").[4] In the Act, Congress

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[1] Attachments to utility poles do not represent the only method or technology for distributing cable television signals but are considered to be most economical by the cable television companies.

[2] *Continental Cablevision* v. *American Elec. Power Co.*, 715 F.2d 1115, 1116 (6th Cir. 1983).

[3] Florida Power Corporation is a wholly-owned subsidiary of Florida Progress Corporation and is affiliated with the following: Electric Fuels Corp., Talquin Corporation, Hunnicutt Equities, Progress Equities, Inc., and Progress Financial Services, Inc. This listing is included pursuant to Sup. Ct. R. 28.1.

[4] It is unnecessary to respond in detail to appellants' various allegations that cable companies were paying rates that were demonstrably unfair. The facts that there is a disparity between the rates negotiated between the parties and those set by the FCC, and that the cable companies' pre-tax profits were reduced by the cost of renting pole space in no way prove that an inherently unfair situation existed. Suffice

authorized the Federal Communications Commission ("FCC" or "Commission"), subject to preemption by state regulation, to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). Congress prescribed what is "just and reasonable" as that rate which "assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole." *Id.* at § 224(d)(1).

Congress expressly eschewed the adoption of a full-blown ratemaking scheme and instead instructed the Commission to "adopt procedures necessary and appropriate to hear and resolve complaints concerning . . . rates [for pole attachments]." 47 U.S.C. § 224(b)(1). To aid in implementing this scheme, Congress granted the Commission the power to issue cease and desist orders, pursuant to § 312(b) of Title 47. *Id.*

Teleprompter filed a complaint against Florida Power with the Common Carrier Bureau of the Commission on November 18, 1980. Acton filed a similar complaint on February 20, 1981. Prior to the filing of the complaints, Florida Power had been charging Teleprompter an annual rental rate per pole of $6.24, and Acton, $7.15. These rental rates had been negotiated by the parties and agreed to in their respective contracts. *Florida Power Corp.* v.

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it to note that, during the nine years preceding the Act's enactment, while the cable companies complained to Congress that unfairly high rental fees threatened the industry's very existence, the cable television industry was able to develop and prosper. Moreover, in view of the fact that most cable companies have monopolies in their service areas, the evolution of the Act could be properly characterized as an effort by the cable antenna television monopolists to expand their profits at the expense of public utility rate payers.

FCC, 772 F.2d 1537, 1540-41 (11th Cir. 1985). Teleprompter and Acton requested the Commission to order maximum rates of $2.23 and $2.21 respectively, and to insert those rates into the existing contracts between the cable companies and Florida Power. *Id.* at 1541. In its responses, Florida Power objected, arguing *inter alia* that the relief requested would effect a taking of private property without just compensation, in violation of the fifth amendment.[5] *Id.*

On July 16, 1981, the Commission's Common Carrier Bureau issued a Memorandum Opinion and Order responding to the Teleprompter and Acton complaints. The Common Carrier Bureau granted the relief sought by the cable companies. *Id.* In fact, the Bureau went beyond the cable companies' recommendations, authorizing Teleprompter and Acton to occupy space on Florida Power's utility poles for the duration of their contracts and beyond, at a rate substantially lower than that proposed by the cable companies. As a result, the rate ordered was $1.79, $.42 lower than the rate requested by Acton and $.44 lower than the rate requested by Teleprompter. *Id.* The Common Carrier Bureau made no mention of Florida Power's constitutional challenge under the takings clause.

Cox filed a complaint against Florida Power on November 4, 1981, and, relying on the Teleprompter-Acton order, Cox requested that the rate it could properly be charged be reduced to $1.79. *Id.* On March 8, 1982, the Common Carrier Bureau issued a Memorandum Opinion and Order granting Cox's request for imposition of a rate of $1.79. *Id.* The Bureau again failed to address the constitutional arguments raised by Florida Power in its response.

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[5] Florida Power also challenged certain facts alleged in the Complaint, the formula relied on by the cable companies, as well as the unreasonably low rate that the cable companies requested, and the statute's retroactive application to the Teleprompter Contract, which had been in existence prior to the enactment of the Act.

On August 11, 1981, Florida Power filed an application for Commission review of the Teleprompter-Acton order pursuant to Section 1.115 of the Commission's rules (47 C.F.R. § 1.115 (1985)). A similar application was filed with respect to the initial Cox order on April 7, 1982. Florida Power argued, *inter alia*, that the Bureau's order should be reversed for violating the takings clause of the fifth amendment. In a supplemental submission, Florida Power called the Commission's attention to the recently decided case of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

On September 28, 1984, the Commission denied Florida Power's applications for review in a single order (the "Order").[6] The Commission rejected Florida Power's constitutional arguments, asserting that "A commission-ordered abrogation of a contractual pole attachment rate is inapposite to a taking under the *Loretto* doctrine which addressed a physical occupation without any compensation." Order at 6; Government's Jurisdictional Statement at 28a.

Florida Power petitioned for review of the Commission's Order by the United States Court of Appeals for the Eleventh Circuit.[7] A panel of the Eleventh Circuit vacated the Commission's Order, issuing a *per curiam* opinion that relied principally on *Loretto*. The court of appeals held that the Commission's Order had authorized a permanent physical occupation of Florida Power's private property,

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[6] The Order is reprinted as Appendix B to the Jurisdictional Statement of Federal Communications Commission and United States of America ("Government's Jurisdictional Statement" or "GJS"). See GJS at 21a.

[7] Group W Cable (successor to Teleprompter), the National Cable Television Association, and Cox Cablevision Corp., appellants in this Court, intervened in support of the FCC before the Eleventh Circuit. Appellees Mississippi Power & Light Co., Arizona Public Service Co., Alabama Power Co. and Tampa Electric Co. intervened in support of Florida Power.

and that it therefore effected a taking for which just compensation was due under the fifth amendment to the United States Constitution.[8] 772 F.2d at 1544, 1546.

The panel concluded that cable company access to Florida Power's property had been authorized by the government and was in no legitimate sense "invited" by Florida Power. Even assuming that Florida Power had initially "invited" the cable companies to have access to its poles by dedicating pole space to television cables and entering into written agreements with cable companies, the court observed, "it is nonetheless clear that that invitation was made subject to and based upon certain conditions, namely the agreed upon annual per pole rate . . . . While [the cable companies] may have been invited at the outset, they certainly weren't invited at the rate imposed by the FCC." 772 F.2d at 1543.

The panel further held that what the government had authorized was a physical occupation of Florida Power's property: "In regard to the physical attachment then, *Loretto* and the instant case are virtually indistinguishable; they both involve the placement of plates, boxes, wires, bolts and screws upon the property of a reluctant owner." 772 F.2d at 1544.

Finally, the court of appeals concluded that the physical occupation of Florida Power's property authorized by the FCC Order was permanent. The reduced rates had been inserted into Florida Power's contracts with the cable companies, and so "at the very least", the court observed, Florida Power would have to suffer the cable companies'

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[8] Contrary to appellants' contentions, the Eleventh Circuit's decision relied on grounds that were raised by Florida Power in its briefs filed with the Eleventh Circuit and to which the court directed its inquiry at oral argument.

presence on its property for the duration of those contracts. *Id.* Moreover, the court continued, every indication pointed toward the FCC preventing utilities from withdrawing cable access upon the expiration of existing contracts. *Id.* at 1543.

Having concluded that the FCC order effected a taking of Florida Power's property, the court turned to a consideration of whether just compensation for the taking could properly be determined by the FCC pursuant to the formula devised by Congress. Relying upon the separation of powers principles enunciated in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), and applied in several more recent cases, the court held that by authorizing the FCC to make determinations of the compensation to be provided, according to a binding formula set forth in the statute, Congress precluded any true just compensation determination. 772 F.2d at 1544-46. The court ruled the Act's standards for compensating property owners constitutionally inadequate. In the provisions of the Pole Attachments Act, Congress impinged on the judiciary's exclusive province by impermissibly restricting the range of compensation available. The court therefore held the Act unconstitutional and vacated the Order issued thereunder.

The FCC and the cable company intervenors petitioned the Eleventh Circuit for rehearing and suggested rehearing *en banc*. The petitions were denied on November 12, 1985, with no member of the Eleventh Circuit expressing interest in rehearing the case.[9]

ARGUMENT

The court of appeals applied well-established legal principles in its thorough and carefully reasoned opinion.

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[9] The Order of the Eleventh Circuit denying rehearing is reprinted as Appendix F to the Government's Jurisdictional Statement. GJS at 50a.

Contrary to appellants' contentions, the Eleventh Circuit's decision creates no adverse consequences for the government's ratemaking authority; nor does it create a conflict among the circuits. The decision raises no substantial question and therefore does not warrant further review by this Court.

I. The FCC Order Authorized A Physical Occupation Of Florida Power's Property, And So Constituted A Taking Within The Meaning Of The Fifth Amendment To The United States Constitution

A. This Case Is Controlled by the Court's Decision in *Loretto* v. *Teleprompter*, Which Mandates the Conclusion that the FCC Order Effected a Taking of Florida Power's Private Property

The panel below correctly held that the takings issue in the case at bar is controlled by *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, this Court enunciated certain limitations on legislative interference with property rights, which are imposed by the fifth amendment. *Loretto* involved a New York statute that forbade landlords from interfering with the installation of certain cable television equipment on their rental property.

This Court held that the New York statute effected a taking of landlord Jean Loretto's property and remanded the case to the state courts for a determination of the amount of compensation due. The decision was founded upon a simple but fundamental proposition: "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." 458 U.S. 419, 426 (1982). The Court held that the "direct physical attachment of plates, boxes, wires, bolts, and screws to the building" owned by Jean Loretto constituted a physical occupation of Loretto's property. *Id.* at 438. The Court further held that Loretto was absolutely dispossessed of the right to enjoy the occupied property or to exclude the cable company from it, and thus that the

physical occupation was permanent, as distinguished from "temporary" or "intermittent".

The Eleventh Circuit properly ruled that the FCC Order forces Florida Power to endure a similar permanent, physical occupation of its property by direct cable company attachments. It is undisputed that the cable companies' cable equipment physically occupies Florida Power's property. Just as in *Loretto*, there is "a direct physical attachment of plates, boxes, wires, bolts and screws" to Florida Power's utility poles. 458 U.S. at 438.

It is equally clear that, under the FCC's Order, the physical occupation of Florida Power's property is permanent, as that term was defined in *Loretto*. The cable companies' occupation of Florida Power's utility poles is neither intermittent nor temporary; rather, it is exclusive and indefinite in duration. For the duration of the existing contracts, Florida Power has no choice but to permit the cable companies to remain on its property at the rates specified by the FCC. Moreover, the FCC has made it clear that, after the contracts expire, the utility may not discontinue cable television attachments and exclude the cable companies. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C. 2d 1585, 1589 (1978) [hereinafter cited as *Adoption of Rules*]. The Commission has routinely exercised its authority to prevent any attempts by utilities to discontinue pole attachments. 772 F.2d at 1543 and n.4. Indeed, as the Eleventh Circuit recognized, if a utility desires to exclude a cable company, for whatever reason, it is "powerless to do so." *Id.* A utility's efforts to end a cable company's intrusion, if motivated by the inadequacy of the FCC-ordered rate, are deemed "retaliatory" and are met with stay orders to prevent any such exclusion.[10] Thus the court below prop-

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[10] Commission Rule 1.1403(a) requires that: "[a] utility shall provide a cable television system operator no less than 60 days written notice

erly concluded that "the extent of the occupation in the case of Florida Power not only satisfies *Loretto*'s permanency requirement, but significantly exceeds it." *Id.* at 1544.[11]

B. The Appellants' Efforts to Distinguish *Loretto* Have Failed

Appellants attempt to distinguish *Loretto* only superficially, virtually conceding that unless the Court reverses or drastically narrows *Loretto*, that case dictates affirmance of the holding that the FCC Order effects a taking.

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prior to (1) removal of facilities or termination of any service to those facilities, such as removal or termination arising out of a rate, term or condition of a cable television pole attachment agreement. . . ." 47 C.F.R. §1.1403(a) (1985). Upon receipt of such a notice, a cable television company may seek a "temporary stay" of the removal under section (b) of Rule 1.1403. Cable companies have invoked this rule, with great success, to prevent utilities from exercising control over their own poles.

In *Whitney Cablevision* v. *Southern Indiana Gas & Elec. Co.*, File No. PA-84-0017, FCC Mimeo No. 841 (November 16, 1984), for example, the utility ordered the cable company to remove its property because of unauthorized and unsafe attachments which breached the contract between the parties. Deciding that the cable company was reasonably likely to show that the attempted termination was motivated by the utility's wish to avoid pole attachment rate regulation, the Commission stayed the utility's efforts to remove the attachment. Similarly, in *Tele-Communications, Inc.* v. *South Carolina Elec. & Gas Co.*, File No. PA-83-0027, FCC Mimeo No. 3994 (April 19, 1985), the Commission superseded a temporary stay it had previously entered, by issuing a final order preventing a utility from terminating a pole agreement, notwithstanding the utility's reliance on numerous safety violations and unauthorized attachments by the cable operator and the utility's provision of six months' notice of termination.

[11] The government's argument that Florida Power cannot raise or sustain its claim that the attachments are permanent, under *Loretto*, without first attempting to exclude the cables, ignores the fact that this Court found permanence in *Loretto*, on a record that clearly showed that Ms. Loretto had never sought to have the Teleprompter equipment removed from her building. 458 U.S. at 443 n.2 (Blackmun, J., dissenting). GJS at 11, n.10.

As a basis for distinguishing this case from *Loretto*, the government points to the fact that the statute involved in *Loretto* "mandated access to property, while the Pole Attachments Act applies only after the utility has allowed the cable company access to its property." GJS at 9. Appellant cable companies refine the argument slightly, arguing that, unlike Ms. Loretto, Florida Power has agreed to the initial entry onto its property and that the occupation is therefore not government authorized.[12] Jurisdictional Statement of Group W Cable, Inc., National Cable Television Association, Inc., and Cox Cablevision Corporation ("Cable Companies' Jurisdictional Statement" or "CCJS") at 20. Neither version of this argument is tenable.

The Commission's action authorized the cable companies to remain on Florida Power's property at rates far lower than the contractual rates which induced Florida Power initially to allow entry. A private property owner's consent to a stranger's entry at a rate of six dollars does not imply consent to entry at a rate of two dollars. Ordering a property owner to allow continued occupation at one-third the rate the owner accepted voluntarily is no different from ordering an entirely new entry. A person who enters upon property with limited authorization and exceeds the limitations placed on the entry is no less a trespasser than one who enters upon the property with no authorization. *See Restatement (Second) of Torts*, § 168

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[12] Appellant cable companies also suggest that Florida Power retains control of its property, because of provisions in its contracts that permit Florida Power to reclaim pole space if it is needed for utility wires. As is discussed above, it is unlikely that the FCC would permit Florida Power to discontinue an attachment under such a provision. Moreover, as the *Loretto* Court noted, that the property owner is left with one slight strand in the bundle of property rights—the right to exclude, on condition it uses its property in one particular and limiting manner—does not vitiate its right to compensation for the physical occupation. 458 U.S. at n.17.

(1965); *see, e.g., Sabo* v. *Reading Co.*, 244 F.2d 692, 694 (3d Cir.), *cert. denied*, 355 U.S. 847 (1957); *Burton Construction & Shipbuilding Co.* v. *Broussard*, 154 Tex. 50, 273 S.W.2d 598, 603 (1954). As the panel of the Eleventh Circuit observed, "by insisting on a significantly lower rate, the cable companies have themselves transformed their status from that of an invitee, to use their own terms, to that of an unwanted guest." 772 F.2d at 1543.[13]

The government's principal effort to distinguish *Loretto*, however, consists of a single sentence: "Perhaps most significantly, the petitioner asserting a property interest in *Loretto* was the owner of an apartment building, not a regulated utility." GJS at 9. This attempted distinction is factually flawed and also lacks legal significance. The obvious weight appellants place in this perceived distinction shows their grave misunderstanding of *Loretto*.

This Court was presented with and rejected a very similar argument in *Loretto*:

> Teleprompter notes that the law applies only to buildings used as rental property, and draws the conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of

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[13] Moreover, from the outset, the Commission has expressed and exercised its authority to "regulate rates" even in the absence of initial consent to entry or where the initial consent has expired or been terminated: "Even where there is currently no attachment or agreement thereof, the Commission has jurisdiction if: (1) there is communication space designated on the poles and (2) the utility has discontinued attachment in order to avoid such Commission jurisdiction." *Adoption of Rules, supra* p. 9, 68 F.C.C. 2d at 1589. In *David Bailey d/b/a Port Gibson Cable TV* v. *Mississippi Power & Light Co.*, File No. PA-83-0026, FCC Mimeo No. 36118 (September 11, 1985), the FCC demonstrated its readiness to mandate access to a utility's poles even in a case where the utility had declined to contract with the cable company for reasons that included safety, manpower limitations and other economic considerations.

> one type of property but not another type is any less a physical occupation.

458 U.S. at 438-39.[14]

The rule in *Loretto* sets apart permanent physical occupations as a class of actions that warrants no further inquiry before they are determined to be takings. To carve a "utility" exception out of *Loretto* makes no sense at all. Whether the entity whose property is subject to a permanent physical occupation is a regulated utility is equally unimportant, under *Loretto*, as is the economic impact of the regulation that effects the taking and the extent to which it interferes with investment-backed expectations. 458 U.S. at 432. Regardless of the propriety of considering these factors in takings cases involving intrusions short of permanent physical occupations, *Loretto* makes clear that "a permanent physical occupation is a government action of such unique character that it is a taking without regard to other factors that a Court might ordinarily examine." *Id.* Thus, the fact that Florida Power is a provider of electric utility service and is subject to regulation as such is irrelevant. Utility companies, like New York landlords and all other businesses in our society, are subject to regulation, but their property nevertheless remains private property for purposes of the takings clause.

In *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 106 S.Ct. 903 (1986), the California Public Utilities Commission ("CPUC") raised an argument analogous to appellants', by which it attempted to convince this Court to redefine the scope of utilities' property rights and to narrow the constitutional protection accorded to utilities.

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[14] There, Teleprompter emphasized that Loretto was subject to extensive regulation as a landlord, and was therefore somehow not entitled to fifth amendment protection. Here, in contrast, the cable television industry is arguing that Loretto was *not* a highly regulated entity, but that Florida Power is; and therefore although Loretto's property was protected, Florida Power's is not.

The case involved a challenge to a CPUC order which required Pacific Gas & Electric Co. ("PG&E") to carry third parties' messages in the unused space in its billing envelopes. The CPUC argued that because PG&E was a regulated utility: (1) it had a lesser right to freedom from state regulation of its speech than other entities; and (2) it did not have a full constitutionally protected property interest in the unused space in its billing envelopes. 106 S. Ct. at 912. This Court rejected these arguments noting that it had previously rejected the former notion in *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 534, n.1 (1980), and that the latter "misperceives . . . the relevant property rights". 106 S. Ct. at 912.

Equally meritless are appellants' comparable arguments in this case, in which it is urged that Florida Power's property interest in its pole space is entitled only to limited protection under the fifth amendment, because of Florida Power's status as a utility.[15] The fact that a utility company is subject to regulation does not detract from the fact that when a "regulation" authorizes a permanent physical occupation of the utility's property, the regulation constitutes a taking under *Loretto*.[16]

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[15] *See Alabama Power Co.* v. *Alabama Pub. Serv. Comm'n*, 422 So. 2d 767 (Ala. 1982) (public utility property is private property within the meaning of the fifth amendment takings clause); *see also United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624 (1961).

[16] At the heart of appellants' argument is the premise that Congress can effectively override the protections of the fifth amendment, simply by a declaration that its action serves the public interest or provides a public service. CCJS at 3-4. This proposition is without merit or legal basis.

As this Court made clear in *Loretto*, a finding that a law serves a valid public purpose in no way justifies an exception to the takings clause of the fifth amendment. Having posed the question of "whether an otherwise valid regulation so frustrates property rights that compensation must be paid," the Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." 458 U.S. at 425-26.

Public utility rate regulation is not implicated by the facts before the Court. The pole attachment scheme does not deal with Florida Power in its role as a public utility rendering electric service to the public, but rather in its non-utility role as a renter of space on its property, on a contractual basis.[17] This decision will have no more significance for public utility regulation than *Loretto* had for rent control. *See* 458 U.S. at 440.

II. The Pole Attachments Act Does Not Provide For A Proper Determination Of Just Compensation For Property Taken Under Its Authority And Is Therefore Unconstitutional

A. Congress Usurped a Judicial Function by Prescribing a Binding Rule for Determining the Compensation to Be Awarded for Property Taken Which Precludes Consideration of Facts Essential to a Just Compensation Award

The fifth amendment requires the payment of just compensation to a property owner whose property has been taken. U.S. Const. amend. V. Florida Power, having suffered a permanent physical occupation of its property pursuant to the FCC's Order, is entitled to a determination of what constitutes just compensation for the property so taken and to receive whatever amount is found to be just

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[17] Appellants seem to have overlooked entirely the fundamental concept of what a public utility is in their attempts to portray the Eleventh Circuit's decision as a threat to all of utility regulation. Their characterization of leased space on utility poles as a "public utility" is unwarranted. Space on utility poles is property. It is not an essential business or service of public importance in the way that the provision of electricity or water is. *See* J. Bonbright, *Principles of Public Utility Rates* 8 (1961). Nor does it involve a technology of production and transmission. *Id.* at 10. Finally, space on Florida Power's poles is not something provided to or demanded by the public at all. *See* 1 Priest, *Principles of Public Utility Regulation* 10-12 (1969).

compensation. Because the Pole Attachments Act deprives Florida Power of any opportunity to have a determination made as to what constitutes just compensation, the Eleventh Circuit properly held the statute unconstitutional.[18]

The compensation provided in the Pole Attachments Act for property taken pursuant to its terms is determined according to § 224(b) and (d) of the Act. These subsections speak in terms of assuring that a utility recovers:

> not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d).

The scope and form of the proceedings before the FCC are explicitly and implicitly limited by this binding formula. The FCC's assigned role is to award compensation within the bounds of the formula devised by Congress. Only information related to those costs identified in the formula is considered by the FCC in its resolution of complaints lodged by cable companies.

When the FCC's formula for determining "compensation" is evaluated according to the standards of the fifth

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[18] Contrary to appellants' contention, the Eleventh Circuit did *not* hold that an administrative agency may never make an assessment of facts relevant to a determination of just compensation. The decision in *Florida Power* is a narrow one that addresses only the particular facts generated in the context of the Pole Attachments Act, a unique statutory and administrative scheme. 772 F.2d 1537, *passim*.

amendment, its substantive shortcomings are evident.[19] It involves a narrow cost calculation, based on certain factors selected by Congress. This formula is entirely unrelated to the traditional measures of just compensation, such as fair market value. *Kirby Forest Industries* v. *United States*, 467 U.S. 1, 10 n.14 (1984); *United States* v. *320.0 Acres of Land*, 605 F.2d 762, 781 (5th Cir. 1979).

In place of a determination of just compensation, Congress prescribed a "binding rule" which leaves the Commission no latitude to award fair market value or any other constitutionally acceptable measure as compensation. Thus the statutory formula preempts any determination under broader constitutional standards.[20]

The Eleventh Circuit relied on the well established doctrine that Congress may not prescribe a binding rule which restricts or prevents the determination of constitutionally

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[19] The disparity between these Congressionally-selected cost figures and traditional just compensation measures needs hardly be elaborated. A Congressionally-enacted rule limiting recovery in the context of takings of homeowners' property to a cost-based measure would engender immediate constitutional challenges. Such a rule would deprive the homeowner of all appreciation in value of the house and make dispositive the homeowner's purchase price, together with the cost of certain improvements, while eliminating all consideration of fair market value.

[20] The government attempts, by way of an *ipse dixit*, to equate the FCC's determination of so-called "fully allocated costs" with the measure of just compensation required by the fifth amendment. GJS at 12. There is no basis for such an association, in law or in fact. The cases cited in support of this premise are completely inapposite and shed no light on the proper content or definition to be assigned to "just compensation" for a permanent physical occupation. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) is a ratemaking case, not a case involving a *per se* taking; *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 105 S.Ct. 1441 (1985) is based on the notion of due process rather than a taking claim; and *Alabama Power Co.* v. *FCC*, 773 F.2d 362 (D. C. Cir. 1985) does not decide the issue of whether the Pole Attachments Act provides just compensation as required by the fifth amendment.

adequate compensation. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893) ("It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation"); *Miller* v. *United States*, 620 F.2d 812, 837 (Ct. Cl. 1980); *American-Hawaiian Steamship Co.* v. *United States*, 124 F. Supp. 378, 381, 129 Ct. Cl. 365 (1954), *cert. denied*, 350 U.S. 863 (1955); *Hudson Navigation Co.* v. *United States*, 57 Ct. Cl. 411, 415 (1922); *cf. United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 124 n.3 (1950).

The government concedes the unconstitutionality of situations "in which the legislature has attempted to 'constitute itself the judge in its own case' by condemning property and determining the amount it must pay for it." GJS at n.15 (quoting from *Isom* v. *Mississippi Central Railroad*, 36 Miss. 300, 315 (1858)). What the government fails to note is that, in enacting the Pole Attachments Act, Congress has done precisely this. By prescribing a narrow formula to govern awards for the *per se* takings that the Act effects, Congress has constituted itself the judge in its own case. Particularly in the context of an economic fight between two competing interests, independent judicial determination of the amount awarded is essential to preserving the protection afforded by the Constitution.

As the government aptly notes, *Monongahela* established that "Congress cannot circumscribe the ultimate judicial determination of whether the compensation provided is constitutionally adequate by prescribing statutory limits on the amount to be paid." GJS at n.15. Yet it is difficult to describe in other than those very terms what Congress has done in the Pole Attachments Act. Indeed, the government acknowledges that the Act defines what compensation is adequate and prescribes statutory limits—not less than the "incremental costs" of the attachment nor more than the "fully allocated cost". See GJS at 3.

As the court in *American-Hawaiian* recognized, "it may be impracticable, from the Government's standpoint, to determine just compensation" by means of an in-depth inquiry into the facts of every case, as part of an ongoing administrative scheme. 124 F. Supp. at 383. Nevertheless, the right to a particularized "judicial determination, if a property owner is dissatisfied with the compensation determined" through such a scheme, is constitutionally required. *Id.*

At no point is an inquiry of constitutionally adequate scope possible in the determination of compensation for takings effected by the Pole Attachments Act. The Act violates the fundamental procedural due process principle that a "hearing appropriate to the nature of the case" must be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The Eleventh Circuit's conclusion that the unduly "binding" nature of the Act's formula necessarily renders it unconstitutional can hardly be doubted. Indeed, as the court below recognized in characterizing the enactment of the formula as a "usurp[ation]" of an appropriately "judicial" role, the constitutional inadequacy of the overall scope of inquiry for which the Act allows also represents a violation of the proper federal separation of powers. *Florida Power*, 772 F.2d at 1546. *See, e.g., Monongahela Navigation*, 148 U.S. at 327.

B. Appellate Review of FCC Pole Attachment Orders Under the Administrative Procedure Act is Insufficient to Satisfy the Constitutional Requirement of a Judicial Determination of Just Compensation

Appellants concede that just compensation is a question reserved for judicial resolution but argue that as long as there is some judicial review of an agency determination, the Constitution's requirements are satisfied.[21] The gov-

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[21] *Bauman* v. *Ross*, 167 U.S. 548 (1897) lends no support for the application of this proposition to the case before the Court. The holding

ernment points to the opportunity for judicial review of FCC orders under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"), as providing the requisite opportunity for the judiciary to determine whether the orders provide just compensation. However, because of the substantive and procedural limitations of the FCC complaint proceedings described above, there is no opportunity for effective judicial review of the FCC's compensation determinations.

As is discussed in II. A, *supra*, the formula according to which the FCC must determine the compensation for pole space taken is a rigid and exclusive one. An appellate court, reviewing an FCC order, is as "bound" by Congress's formula as is the agency itself. First, the reviewing court is limited by the factual record created before the Commission. In its effort to determine whether an order is contrary to constitutional right, pursuant to 5 U.S.C. § 706 (2)(B), the court is necessarily limited to consideration of the narrow range of costs that the Commission culls for purposes of its calculation of "fully allocated costs".

Based on such a limited record, an appellate court cannot determine any useful measure of compensation other than fully allocated costs; the court is completely foreclosed from determining what would constitute just compensation according to the traditional formulation—fair market value—or from consideration of facts that might warrant a deviation from that standard.[22]

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in *Bauman* resolved a seventh amendment issue only. The language in the opinion regarding the determination of compensation by any but court-appointed and court-supervised "commissioners" is dicta.

[22] Examples of evidence that would be relevant in making a fair market value determination include various contract rates for pole rental, including the rates established in arms-length negotiations between utility companies and telephone companies, which are necessarily excluded from the Pole Attachments Act's scheme. See *United States* v. *Trout*, 386 F.2d 216, 222-23 (5th Cir. 1967); 4 Nichols, *The Law of Eminent Domain* § 12.311[1] (rev. 3d ed. 1985).

The procedural limitations of the pole attachment proceedings similarly vitiate the constitutional purposes that judicial review of an agency determination might otherwise arguably advance. The parties before the FCC are not given the opportunity to take discovery or to present much of the evidence that would be material, competent and relevant to a constitutional determination.[23] Affidavits of the parties providing proposed cost calculations, the contracts between the parties, and information supplied to the Federal Energy Regulatory Commission are the data on which the FCC relies in issuing its orders. There is no opportunity to present live witnesses and no cross-examination of the information supplied by each party. And the parties are foreclosed from offering any sort of expert testimony to assist the agency in determining what is just compensation.

Thus, even were the scope of the FCC's inquiry not unacceptably limited by the statutory formula for compensation, serious questions would remain as to the adequacy of the hearing procedures, insofar as they limit the FCC's ability to make a "reasonable, certain and adequate" provision for determining compensation. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974) (quoting *Cherokee Nation* v. *Southern Kansas Railway*, 135 U.S. 641, 659 (1890)). The inadequacy of the FCC's fact-finding procedures, compounded by the deference which appellate courts must accord the factual findings of an agency under the APA (*see, e.g., Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971)), prevents any effective judicial review of an FCC compensation determination. In essence, the Act creates an irrebuttable presumption of what will constitute just compensation.

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[23] Florida Power notes that even its request for *limited* discovery in the proceedings before the Commission was denied.

The appellants argue that the Eleventh Circuit erred in holding the Act invalid without first considering whether the particular Order before the court did, in fact, provide just compensation. CCJS at 26-27. The simple answer to this, explained more fully above, is that, on the record before it, the Eleventh Circuit *could not* evaluate what constituted just compensation for the property taken by the Order; hence, the panel lacked any basis for determining whether the Order before it did or did not provide just compensation.

Moreover, even had it been possible for the reviewing court to make the determination proposed by appellants—namely whether the Order provided just compensation—such an inquiry would not have produced a different result. Given the absolute limitations imposed on the FCC by 47 U.S.C. § 224(d), circumscribing the range of pole rental rates that the FCC can order, a reviewing court would be unable, without abandoning judicial restraint, to give any effect to a finding that an Order which provided "fully allocated costs" did not provide constitutionally adequate compensation. If the court remanded the matter to the Commission, the FCC would still be bound by the terms of its statutory delegation to order a rate that did not exceed fully allocated costs. Thus, under the inquiry proposed by the appellants, the only remedy available to a reviewing court would be to declare the statute unconstitutional.

The Eleventh Circuit therefore reached the only proper result, following its review of the Act and the Order. The Order was vacated and the Act declared void because they were contrary to constitutional right. 5 U.S.C. § 706 (2)(B). Virtually every determination by the FCC under the Act effects a taking, and in every instance some measure of compensation determined by Congress is awarded to the property owner as a substitute for judicially-determined

just compensation.[24] Such a statutory scheme is unacceptable under the fifth amendment.

III. The Eleventh Circuit's Decision Is A Sensible And Correct One Which Neither Creates A Conflict Among The Circuits Nor Has Any Adverse Consequences For The Government's Authority To Fix Prices Or Regulate Rates In The Public Interest

The government attempts to cast clouds of doubt on the Eleventh Circuit's decision and to shadow it with drastic consequences in an effort to convince this Court to take this opportunity to reconsider *Loretto*. Appellants advert to a claimed conflict among the Circuits caused by this

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[24] Appellant cable companies suggest that if the Act effects a taking, a Tucker Act remedy may be available to utilities and thus renders unripe any challenge to the constitutionality of the compensation provided by the statute. CCJS at 24. This suggestion lacks merit. Congress did not intend to subsidize the cable television industry at the expense of the taxpayers; it makes no sense to interpret the statute to do so.

Unlike the subsidiary provision at issue in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the compensation scheme of the Pole Attachments Act is the heart of the Act. There was no reason in *Monsanto* to doubt that Congress was dedicated to keeping the main substance of the Federal Insecticide, Fungicide and Rodenticide Act registration program in operation, even if the federal treasury was thereby exposed to some potential liability. *See Regional Rail Reorganization Act Cases*, 419 U.S. at 149, n.36.

Considerations of judicial economy and avoidance of governmental waste, inefficiency and duplication of effort militate strongly against a Tucker Act remedy as well. To infer that such jurisdiction exists would create a lengthy and wasteful trail of judicial review: the FCC would reach a determination under the Act; the circuit court of appeals would review this determination under the Administrative Procedure Act; challenges of the formula could be raised in this Court; a suit could then be filed in the Claims Court for redetermination of the constitutionally proper compensation; the Claims Court decision would be appealable to the Court of Appeals for the Federal Circuit; any issue meriting consideration could then be appealed to this Court. Such a wasteful result was recently rejected by this Court in *Lindahl* v. *Office of Personnel Management*, 105 S.Ct. 1620, 1637 (1985).

decision, CCJS at 19, and suggest that the very foundation of government rate-making authority is threatened by this decision. *Id.* at 14-15. Neither contention is true.

A. *Florida Power Corp.* v. *FCC* Does Not Conflict with any Decisions by Other Circuits

In support of their claim that the Eleventh Circuit has created a conflict among the circuits, cable company appellants describe the decision in this case as one that extends *Loretto* beyond permanent physical occupations, in contrast to those in other circuits which have not extended *Loretto*.[25] CCJS at n.37. As Florida Power has repeatedly emphasized, this case involves a permanent physical occupation of the very sort that *Loretto* entailed. This case does not extend *Loretto*; it simply applies the "permanent physical occupation" standard in a straightforward way. The cases cited by appellants are all cases involving rent control laws; thus, the courts were presented with facts that were significantly distinct from those in *Loretto*, based on which they found no "permanent physical occupations" within the meaning of *Loretto*. Appellants do not and cannot explain why the application of *Loretto* to the Pole Attachments Act should dictate the result in the very different context of rent control laws.

B. Affirmance of the Eleventh Circuit's Decision Will Have No Adverse Consequences for Governmental Rate Regulation

The cable company appellants repeatedly emphasize the supposedly dire consequences the Eleventh Circuit's decision will have upon government regulation generally, and ratemaking in particular.[26] The same concern was raised by Teleprompter and dismissed by this Court in *Loretto*

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[25] The government does not contend that the Eleventh Circuit's decision has caused a conflict among the circuits.

[26] It is notable that the government has not evinced a similar concern in its jurisdictional statement.

with respect to the impact of the Court's decision on the regulation of landlord-tenant relations. 458 U.S. at 418. The cable companies' concern for the future of government regulation is unwarranted here for the same reason it was deemed unwarranted by the Court in *Loretto*. The Eleventh Circuit's decision leaves unaffected the government's authority to regulate the public uses to which private property is put, as long as such "regulation" does not authorize a permanent physical occupation of private property. *Id.*

The Eleventh Circuit's decision will have no impact whatsoever on ratemaking or price-fixing as such. Fixing the prices a property owner may charge for a given property use may diminish the value of the regulated property (*FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944)) but does not involve compelled physical occupation of the owner's property by government or others.

Nor do any of the cases cited by appellants, as examples of the type of regulation that they predict would be deemed takings, involve permanent physical occupations. Most involve a simple exercise of ratemaking authority without any physical intrusion.[27] Given the wholly different analysis applicable to permanent physical occupations, the situations covered by these cases are unaffected by the ruling of the Eleventh Circuit, which properly applied *Loretto* to a physical invasion of property.[28] The Eleventh Circuit's

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[27] *E.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936).

[28] Appellant cable companies also cite a list of cases involving challenges under the APA to rates set in conjunction with interconnections among utilities. CCJS at n.24. None of these cases raises or addresses a claim under the takings clause. The crux of these cases is the sharing of power generated by the utilities. It is not at all clear how a claim of permanent physical occupation could be sustained in this factual context.

In any event, these cases are fundamentally distinct from the case

decision will have no effect upon conventional rate regulation of the sort approved in *FPC* v. *Hope Natural Gas*.

To the extent that government action goes beyond simple price-fixing or conventional regulation, and authorizes permanent physical occupation of private property, the Eleventh Circuit opinion goes no further than *Loretto* in holding that such action effects a taking *per se*. A state law or administrative order may serve important public purposes, but that is irrelevant to whether there has been a *per se* taking, 458 U.S. at 419; at the same time, the fact that a government action is deemed a taking does not lead ineluctably to the frustration of the public purposes served by the government action, but means only that private property thereby taken must be justly compensated. *Id.* at 425.

C. Summary Affirmance Is Appropriate in This Case and Will Best Protect the Constitution and the Public Interest

The Eleventh Circuit undertook a careful and reasoned analysis of the Pole Attachments Act, in light of this Court's recent interpretation and application of the takings clause of the fifth amendment. As is discussed in Parts I and II, *supra*, the decision on the merits is analytically sound: the Pole Attachments Act effects a *per se* taking of property; and it substitutes an unacceptable abbreviated administrative computation of certain costs for the judicial determination of just compensation required by the fifth amendment. In its present form, the statute cannot be given effect without violating constitutional rights.

However, the constitutional defects in the statute are not inevitable by-products of Congress's expressed purpose in enacting the law. Rather they are engendered by a

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before the Court because they involve utilities in their capacities as public utilities—generating and providing electricity or telephone service for public use. For that independent reason, the analysis used in such cases is distinct from the analysis applicable to *Loretto* and this case.

confluence of different elements of the Act's structure and substance, many of which are extraneous to Congress's expressed purposes. Congress inadvertently created a mechanism for taking property in pursuit of an arguably valid purpose, and therefore made insufficient provision for constitutionally adequate compensation. Now, made aware of the constitutional implications of certain aspects of the statute, Congress can draft similar legislation, modified in any number of ways to rectify the constitutional problems, and still achieve its stated goals.

While Supreme Court review plays a role of utmost importance in enforcing and interpreting the Constitution, full review by the Supreme Court in this case is not necessary and therefore should be spared. A further decision would entail principally a reiteration of what *Loretto*, *Monongahela* and subsequent decisions of this Court make clear.

The application of these cases and doctrines to the Pole Attachments Act reaches no new thresholds in constitutional law. Given the unique nature of the statute involved, the implications of the decision in this case are tightly circumscribed. No conflict among the circuits has developed or will result from affirmance of this ruling.[29] Affirmance will permit Congress to begin at once to review the structure of the Act, in light of its goals and purposes and the requirements of the fifth amendment, and to enact expeditiously any new legislation it sees fit.

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[29] In the wake of the Eleventh Circuit's decision in this case, all pole attachment proceedings pending before the FCC have been held in abeyance. The issue is thus isolated in this Court.

CONCLUSION

For the foregoing reasons, appellee Florida Power respectfully requests that this Court affirm the decision of the Eleventh Circuit.

Respectfully submitted,

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